

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL JURISDICTION**

**CV NO. 0927 of 2006**

**BETWEEN**

**LEONIE MARBELL**

**CLAIMANT**

**AND**

**GOTE PROPERTIES INC.**

**DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.**

**2020: September 25**

**Mrs. Marguerite Woodstock-Riley Q.C., in association with Ms. Lydia Farley, Attorneys-at-Law for the Claimant.**

**Mr. Leslie Haynes Q.C., in association with Ms. Fay Finisterre and Mr. Daine Hinds, Attorneys-at-Law for the Defendant.**

## **DECISION**

### **Introduction**

[1] The Claimant slipped and fell on an outside stair to the Defendant's business premises. She is claiming damages for personal injuries sustained as a result of the fall.

## **Background**

- [2] The Claimant is a British national who resides in England. On 13 June 2003, while on a visit to Barbados, she went to the Defendant's place of business at Sheraton Centre, Sargeants Village, Christ Church. She left via the food court, and exited the building on to an uncovered stairway. The rain had fallen and parts of the stairway were still wet. While negotiating her way down the stairs, the Claimant slipped, fell and injured her right knee, with a minor soft tissue injury to her left hand.
- [3] The Claimant was taken to the Queen Elizabeth Hospital where she received medical attention. She returned to England on 16 June 2003, having been transported from the hospital to the airport by ambulance. On arrival in England on 17 June 2003, she was again transported by ambulance to another hospital where two surgeries were performed.

## **The Pleadings**

- [4] The Writ of Summons was filed on 25 May 2006, and the Statement of Claim on 11 February 2007. It is alleged that as a visitor to the Defendant's premises, the Claimant slipped and fell on a wet step as a result of the negligence and/or breach of statutory duty of the Defendant. There are particulars of negligence, particulars of breach of statutory duty, particulars of injury, and particulars of special damage.

[5] The particulars of negligence are:

- (1) failing to keep the staircase dry and free of any substance likely to cause the Claimant to slip and fall;
- (2) permitting the staircase to become and/or remain wet and thereby likely to cause the Claimant to slip;
- (3) failure to clean up the water or any other substance;
- (4) failure to warn the Claimant whether adequately or at all of the presence of water or any other substance on the stair;
- (5) failure to set up and operate any or any adequate system of inspection and maintenance of the exterior entrance and/or exit and staircases of the premises whereby the presence of water or any other substance could have been detected and remedied before the Claimant's accident;
- (6) failing to issue instructions to appropriate staff to mop up the water or any other substance;
- (7) failing to guard fence off or otherwise prevent the Claimant from walking in the wet area;
- (8) failing to provide adequate railings or handrails;
- (9) failing to provide adequate or appropriate steps/stairs; and
- (10) failure in all circumstances to discharge the common duty of care in breach of section 4 of the Occupiers Liability Act ("Cap. 208").

[6] The particulars of breach of statutory duty are:

- (1) failing to discharge the common duty of care owed to the Claimant in breach of section 4 of Cap. 208;
- (2) failing to take any or any reasonable care to see that the Claimant would be reasonably safe in using the premises as a lawful visitor;
- (3) causing or permitting the staircase to be or to become or to remain a

danger and a trap to persons lawfully using the same;

- (4) causing or permitting the water, fluid or other moist or slippery substance to be present on the staircase;
- (5) failing to cause the water, fluid or other moist or slippery substance to be cleaned up and the staircase to be dried;
- (6) failing to institute or enforce any or any adequate system for the inspection and cleaning of the staircase;
- (7) failing to give the Claimant any or any adequate or effective warning of the presence of the substance on the staircase;
- (8) permitting the Claimant to walk down the stairs when the Defendant knew or ought to have known that it was unsafe and dangerous for her to do so;
- (9) failing to place any barrier around the wet or moist area of the staircase;
- (10) failing to provide adequate railings or handholds; and
- (11) failing to provide adequate or appropriate steps/stairs.

[7] The particulars of injury, which are not disputed, are

- (1) rupture of the right ligamentum patella;
- (2) tear in the medial meniscus of the right knee;
- (3) soft tissue oedema of the right knee;
- (4) significant post-operative scarring of the right leg; and
- (5) soft tissue injury to the left arm.

[8] The overall claim is for:

- (1) general damages for pain suffering and loss of amenities and loss of enjoyment of holiday;

- (2) special damages in the sum of \$11,728.24
- (3) loss of earnings;
- (4) damage for handicap on the labour market;
- (5) damages for past domestic assistance;
- (6) damages for future domestic assistance;
- (7) damages for future transportation costs;
- (8) interest at such rate and for such period as the Court thinks fit;
- (9) further or other relief; and
- (10) costs.

[9] The Defendant admits in its defence that at the material time it was the owner of the business premises at the Sheraton Centre. It does not dispute that the Claimant fell on a step outside the eastern exit/entrance to the premises. The Defendant conceded that part of the steps were wet as a result of rainfall.

[10] Liability is denied either at common law or under Cap. 208. It is said that even if the Defendant owed the Claimant a duty of care, that duty was discharged by the Defendant taking “such care as in all the circumstances was reasonable to see that the [Claimant] would have been reasonably safe in using the premises”. That reasonable care included the provision of handrails, and the installation of non-skid tiles on the steps.

[11] The Defendant alleges that the Claimant’s fall was due to her own negligence,

in that she:

- (1) failed to look where she was walking;
- (2) failed to hold on to the handrail properly or at all or to take any other sufficient step to avoid falling; and
- (3) failed to observe that the step or steps were wet.

[12] In her reply the Claimant denied contributing to her injuries by her own negligence. Her injuries, loss and damage were caused solely by the negligence of the Defendant and its servants and or agents. Furthermore, the Claimant insisted that she used the handrails to assist with her descent of the steps. She knew that the rain had fallen, and that the steps were wet; and she exercised caution in her descent.

### **The Issues**

[13] The issues here are whether the Defendant is liable for the Claimant's injuries and, if liable, what measure of damages is appropriate in the circumstances.

### **The Legal Matrix**

[14] Given the plea of negligence on the part of the Defendant, the Claimant must prove that the Defendant owed her a duty of care; that the Defendant breached that duty; and that her injuries resulted from the breach. (See **Vaughan v. National Sports Council, Civil Suit No. 1445 of 2004, B'dos HC, decision dated 24 April 2007**; and Charlesworth and Percy on Negligence, 12<sup>th</sup> ed. at

para. 1-34).

[15] With respect to occupier's liability under Cap. 208, the Defendant conceded that it was the occupier of the premises, and that the Claimant was a lawful visitor to those premises. Therefore, as an occupier, the Defendant owed the Claimant a common law duty of care.

[16] Section 4 of Cap. 208 speaks to the extent of the Defendant's ordinary duty of care. That section provides as follows:

“(1) An occupier of premises owes the same duty (in this Act referred to as “the common duty of care”) to all his visitors, except so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5) Where damage is caused to a visitor by a danger of which he had been warned by the

occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

(6) ....

(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor”.

[17] Having established that the Defendant owed the Claimant a duty of care, there are two questions to be answered by the Court. These questions are: what was the extent of the duty, and were the Defendants in breach of that duty? (See **Wheat v. E Lacon & Co. Ltd. (London) Ltd. [1966] 1 Q.B. 335** at 365).

[18] It is for the Claimant to prove, on a balance of probabilities, that the Defendant was negligent and/or in breach of its statutory duty of care to her. On the other hand, the Defendant bears the burden of proving contributory negligence on the part of the Claimant. (See **Keisha Henry v. Sandals Ocho Rios Limited [2018] JMSC. Civ. 102** at para. [45], per Lindo J; Blackstone’s Civil Practice 2014, at para. 49.40; and Evidence Act, Cap. 121, s.133).

### **The Evidence Relevant to Liability**

[19] The evidence to be considered here is that of the Claimant and her witness Andre Hinds, together with that of the only defence witness and an expert in occupational safety. These four witness referred to photographs and drawings

that were produced by Mr. Albert Selby on 09 October 2013. At that time Mr. Selby's company SRM Architects Ltd., was the architect for the Sheraton premises owned by the Defendant. The photographs were taken after the incident, in the area where the Claimant fell.

**(1) Leonie Marbell**

[20] The Claimant was eighteen years old when she came to Barbados in June 2003 to celebrate her birthday. She stayed with her great aunt Vivian Garrett in the parish of St. Philip. On 13 June 2003, she visited the shopping mall situated at the Defendant's business premises at Sheraton. The Claimant was accompanied by Andre Hinds.

[21] The Claimant's evidence is that it was a rainy day with intermittent heavy showers. She made a food purchase before exiting the building via the uncovered outer eastern stairway. She was ahead of Mr. Hinds, and there was nothing in her hands. She did not see any wet floor signs inside the building before she went out, or any janitorial persons.

[22] The Claimant's witness summary filed on 16 December 2011 states that:

“6. I was exiting the building using an exterior staircase by the entrance to the Food court by KFC which leads to a carpark. There are two sets of steps separated by a landing or platform. The staircase was uncovered. Andre was behind me.

7. The staircase was wet. I was descending the

stairs while holding the handrail with my right hand but I slipped and fell on the second set of steps because of the moisture on them. The railing was also wet.

8. There were no warning or caution signs.
9. I immediately felt pain in my right leg. A security guard told me to stay where I was ...”.

[23] At the trial, the Claimant was asked by her counsel whether she made any observations about the stairs. She responded that the stairs were “wet and slippery”. She identified four photographs as showing the area where she fell.

[24] The Claimant was taken to the Queen Elizabeth Hospital where she received medical attention. She was admitted to Ward B5. On 16 June 2003, the Claimant was transported to the Grantley Adams International Airport by ambulance. She boarded a flight to London, and arrived in London on the following day. Another ambulance service transported her to the North Middlesex Hospital where she received further medical attention.

[25] The Claimant was questioned extensively about her fall during cross-examination by counsel for the Defendant. She responded as follows:

“I was aware when leaving the mall that there were heavy showers that day. When I exited I looked at the steps to see the condition that they were in.

Some parts were dry and I tried to go down these parts, and some parts were wet and slippery. There

was no pause. I found it slippery for the first time when I slipped.

I made a special effort to walk on the dry parts but it was difficult to tell as some parts .... but they all looked shiny anyway.

Attempting to walk on the dry parts took me to the right side of the steps going down. I was ahead of Andre. I was on the second platform. I don't recall how many steps up or down....

I had traversed/come down the steps to the first landing. I slipped on the second or third step.

I used the handrail from the time I took my first step on the steps. There were five steps before the first landing. I went down one foot in front of the other and each foot on a different step. I am unsure which foot slipped.

I slipped. I tried to stop myself from falling completely by holding on a bit harder and stopping myself on my left side and found myself at the bottom of the stairs. I was holding on harder to the rail with my right hand....

I moved my hand along the handrail as I went down the steps from the time I started. I had to use the handrail for my whole journey on the stairs. I used it for support. It was effective in giving me this support....

I am still unsure which foot slipped. I can't say...

I banged my left arm on the step. I attempted to break my fall by trying to stop myself from falling completely.

I do not disagree with the doctor's report that I banged my left arm in attempting to break my fall. I would have banged my left hand on the steps. I attempted to break the fall by trying to stop myself

from actually falling completely; so holding on to the rail and then using my left side to stop myself.

It would be a common sense thing. If you're holding on to something with your right, and you fall, you're going to fall towards and try and stop yourself to your left to try and balance yourself out.

I don't remember if I was falling to my left but I'm saying that it's a common sense thing if you are falling and you're holding on to something with your right you are going to try to use your left to actually balance it out to try to stop yourself from falling completely.

I don't remember how I used my left. I can't remember if my left hand hit the steps before anything else. It is correct that my right hand did not hit the steps. I agree that if my right hand had hit the steps it would have been bruised.

I think I was still holding on to the rail with my right hand when I fell and hit the steps. I can't remember if my left hand hit before any other part, but I do remember putting my hand out. I don't remember if I was still holding on to the rail when I reached the bottom of the steps. I actually don't remember banging my left arm. I agree that my left arm was bruised".

## **(2) Andre Hinds**

(26] Mr. Hinds was the eyewitness to the Claimant's fall. In his brief witness statement he deposed that:

"4. ...when we were leaving [Sheraton Mall], it was not dark but it had recently rained. We left by the door by the food court. [The Claimant] was ahead of me before she began walking down the steps. She was not running, she had gone about three steps

when I saw her take a fall and ended up at the bottom of the steps. The corners of the steps were slippery. After [the Claimant] fell, someone walking almost slipped while we were there”.

[27] During his oral evidence, Mr. Hinds was shown the photographs. He informed the Court that the Claimant fell just after the first step after the landing or platform, and that she landed on about the third step. He also swore that the photographs depicted the staircase as it looked when the Claimant fell.

[28] During cross examination, Mr. Hinds testified as follows:

“Yes it was a rainy day.... We exited by the door by the food court. A purchase was made at KFC... [The Claimant] left first but I held the door. I don't recall if she had anything in her hand.

It was overcast when we left the food court. It was not raining...I saw someone slip after [the Claimant] fell...

When [the Claimant] fell I was still behind her. She was ahead of me and I would have seen her back... she went down the steps...while holding the rail. I saw her fall. I don't think I can give you the dynamics of the fall. I recall her rolling. I believe she stopped about the second step. It is correct that I said the corners were slippery”.

[29] When asked by counsel for the Defendant if he was in a position to say why the Claimant slipped, Mr. Hinds replied that he could only use his judgment that she slipped. And the only substance he recalled that was on the steps was water.

[30] Mr. Hinds also mentioned seeing someone else also slip after the Claimant fell. (See para. 28 supra). He explained that:

“There was a person who was using the stairs who slipped...The person I saw falling was to my left. I don’t recall if it was the middle or the far left. This was near the top where I was... I was at the top landing and they were at the top of the steps coming down to the left of me. I was on the edge of the landing and they were on the edge of the landing as well”.

**(3) Harold Oxley**

[31] Mr. Oxley was accepted by consent as an expert in the areas of occupational safety, health and hygiene. He was engaged to give advice on the general safety requirements applicable to outdoor stairways. He produced a report dated 18 July 2012. (Exhibit HO2). Written questions were submitted to him by the Defendant, and Mr. Oxley responded by way of an additional witness statement filed on 28 February 2014. His responses to the questions are annexed to the second witness statement. (Exhibit HO5).

[32] Mr. Oxley’s expertise was directed towards the general safety requirements applicable to outdoor stairways. And in this regard he considered the Barbados National Building Code, (“the Code”), and a number of international building codes. Mr. Oxley drew the following conclusions in his first witness statement:

- “9. Outdoor stairways should be built so that water will not accumulate on the walking surfaces and stairways should be kept from the accumulation of water as far as reasonable practicable.
10. All accessible stairways should have handrails on both sides that extend the full length of the stairway. Handrails should be such that they can be readily grasped without obstruction and the handrails should be constructed to provide adequate resistance to hand slippage.
11. Stairs wider than 2.3m wide should be divided by an additional/intermediate handrail particularly in highly trafficked areas. This requirement is important as it enables all persons using the stairway at the same time to be within reach of a handrail and it ensures that a handrail is near enough to be grasped by people who lost their balance.
12. I am in receipt of four pictures of the stairway in question and these were reportedly taken at or around the time of the incident....These pictures indicate that there was no additional/intermediate handrail at the time of the incident and that the stairway was not covered to ensure that water would not accumulate on walking surfaces”.

[33] The Court considers the critical aspects of Oxley’s evidence to be as follows:

- (1) His description of the stairs as consisting of two flights and a landing.
- (2) He did not know when the stairs were built. However, the relevant date for the application of the Code would be the date of construction. The Code was revised from time to time with working versions of the Code released in 1992 and 1993. The most recent version was published in 2013. (See Oxleys “Stairway Safety:

Responses To Finisterre Attorneys,” at p.3 of Exhibit HO5 attached to his second affidavit filed on 28 February 2014).

- (3) The version of the Code that should guide construction is the version in circulation at the date of construction.
- (4) The outdoor stairs on which the Claimant fell had no roof covering. However, there was no requirement in the relevant Code for outdoor stairs to be covered.
- (5) The Code was readily available in Barbados, and was widely used especially amongst larger construction companies for big projects. It was around 1998 to 1999 that the Code was in very common use in Barbados. Mr. Oxley had interfaced with several construction companies that used the Code.
- (6) The Code does not have the force of law in Barbados.
- (7) The stairs were wider than 2.3 metres, and should have incorporated a centre rail. Mr. Oxley was able to estimate the width of the stairs from his observation about the pictures provided by the Defendant. He informed the Court that:
 

“I am aware of what 2.3 metres would look like, approximately 7½ feet. This stairway would be more than 2.3 metres wide. And even by looking at the photograph where a door is at least 6 feet tall, I can see that the stairs are wider than 2 door heights, and therefore would be wider than 12 feet”.
- (8) The Code’s rationale for requiring a centre rail was to allow a person who tripped to stabilise him or herself. Although a rationale is not stated in the Code, Mr. Oxley was familiar with the reasoning behind this guidance because he was a member of the Committee that developed the Code. According to him:
 

“[The Code] is suggesting that a person should be in reach of handrails on both sides....They should have the option to reach one or the other handrail”.
- (9) The architectural drawings for the stairs included a centre handrail. But the stairs as constructed did not comply with the drawings in this respect.

**(4) O'Neale Payne**

[34] Mr. Payne was the Defendant's General Manager when the incident occurred.

He was so employed from 1997, but could not recall the exact month or date.

Mr. Payne deposed in his witness statement that:

- “3. On Friday June 13, 2003 at approximately 5.15 in the afternoon, the [Claimant] was exiting the shopping centre through the external eastern food court...onto the carpark.
4. The staircase was an uncovered staircase and the stairs were covered with an anti-slip finish which I am advised by the architects, Messrs. SRM Architects was a monolithic non-slip surface, with treads measuring 12 inches deep and rises of 6 inches each.
5. The stairs and treads were in good condition. The treads offered persons traversing the stairs a sound surface which was not known to be slippery when wet.  
  
....
8. There were also painted anodized aluminum rails along either side of the staircase for further added security against injury.
9. It had been raining outside earlier that day and while the stairs had all but dried, they were still wet nearest the wall. The area was illuminated by natural daylight.
10. The [Claimant]...had been descending the stairs, walking along the right hand side of the staircase when she fell between the penultimate and third step from the bottom of the staircase.
11. The incident was reported to Mr. Lincoln Bayne who was employed as a Head of Security with the

[Defendant]. He prepared a report of the incident for my attention detailing what had been reported to him as well as what he had observed that day. I subsequently attached the said report to a Public Liability Claim Report for the attention of Harmony General Insurance Company Ltd., the [Defendant's] insurers...**ONP1**...

13. At the time Krisclean Enterprises Ltd were contracted to perform janitorial services which included monitoring areas, especially entrances, and putting up "wet floor" signs. On the date in question, the janitorial contractors had erected "wet floor" signs inside of the food court near the exit through which the [Claimant] had just exited.
14. In 2010, renovations were conducted at the [Defendant's] premises, including renovations to the staircase.  
....
16. Mr. Lincoln Bayne is now deceased".

[35] These are the salient features of Mr. Payne's oral evidence:

- (1) The Sheraton Centre was constructed in 1997 and early 1998. When the eastern stairway was designed, the standards of the international building code were taken into account.
- (2) Although aware of the measurement of the steps in 2010, when the eastern entrance was redecorated, he had no knowledge of the width of the steps. However, the width of the steps had not changed.
- (3) He agreed that the four photographs produced reflected the steps as they appeared at the time of the incident involving the Claimant in 2003.
- (4) He agreed with counsel for the Claimant that the steps appeared worn in one of the photographs. But he maintained that:

“The steps are in the same condition in 2003 as when first built. It was not built worn, it was built in a good condition. I don’t agree that there was wear after five years. The stairs were in very good condition in 2003”.

- (5) Mr. O’Neale was referred to public liability claim reports made by the Defendant to its insurance brokers, in relation to falls by four persons on the eastern stairway between 1998 and 2002. His evidence in cross examination is that:

“In 2003 I was aware of incidents where persons slipped on steps at Sheraton, but in different circumstances. The surfaces were different. The surfaces were different between 2002 and 2003. That is not in my witness statement. I was never asked.

I was aware of the incident in 2003. Nothing in my [witness] statement mentions any of the previous incidences. My witness statement does not speak to renovations before 2010”.

In re-examination Mr. Payne’s offered further explanations:

“I recall saying that there were different circumstances between 2002/2003. The surfaces were different. From my memory the earlier falls were on ceramic tiles. There were ceramic tiles when the food court was first built. The tiles were changed to terrazo tiles similar to what is outside this magnificent [court] building.

The stairs in 2003 were not in the condition as they appear in the photographs”.

- (6) In 2003 there was no centre rail on the eastern stairway. Mr. Payne reaffirmed that:

“... the centre [of the stairs] dries first, and nearest the wall would remain wet for a longer period... I agree that if you are using the handrail you are walking in the area that remains wet. I agree that if there was a centre rail someone using the stairs would have had the option to use the centre rail...In my experience the area near the wall would be the last to dry out/become completely dry.

It was raining earlier in the day. Rain is water. The stairs were wet with water. That does not mean that there was a residue of water. The stairs were still wet nearest the wall; wet with water but there was no residue of water.

I can't give an opinion on whether it would be safer to use a centre rail where it is dry than to use the rail nearest to the wall where the stairs are wet”.

- (7) Janitorial staff were asked to place a wet floor sign at the food court exit to the eastern stairway on the day of the incident.

“During the day when the rain was falling I asked janitorial staff to place a wet floor sign at the exit when persons were leaving. This was to alert them that the steps were wet because they were uncovered. I saw the sign there myself about 3:30 [pm] before I left work. It may have been relevant to tell the broker at that time but I did not think of it. I cannot say if the sign was there at the time of the incident...

From my memory the sign just says wet floor sign. And it's a yellow sign. There was no sign outside that I knew of. There was no sign speaking to the steps being wet. It just states wet floor sign”.

- (8) The eastern stairs were renovated in 2010. The renovations included:

“...covering the steps and putting in a centre rail. The material of the stairs has changed and the railings at the side have changed”.

### **Assessment of Evidence**

- [36] The Court finds that the evidence of the Claimant and her eye witness is more credible when compared to the evidence of the lone Defence witness. Mr. Payne’s evidence was conflicting and unreliable in critical areas. For example, his oral evidence indicated that there were tiles on the stairway which were changed between 2002 and 2003. Mr. Albert Selby, a principal in the architectural firm that oversaw construction of Sheraton Centre, gave sworn evidence at a production hearing in October 2013 that:

“No tiles were used. The exposed granite aggregate was the finish of the stairs”.

- [37] Mr. Selby’s evidence is confirmed by the four photographs that he produced to the Court. Mr. Payne saw these photographs and said that he was familiar with the area shown. Mr. Payne never indicated that the photographs were not a true representation of the eastern stairway at the time when the Claimant fell. His only concern was that the photographs did not reflect the condition of the stairs in 2003.
- [38] In his witness statement Mr. Payne referred to the stairs as having a non-slip

finish or a monolithic non-slip surface. (Para. 4). This allegation was not confirmed by any documentary or expert evidence from the architects who allegedly so advised Mr. Payne.

[39] The Court rejects any suggestion that the surface of the stairs consisted of ceramic tiles that were changed to terrazo tiles between 2002 and 2003. When the Claimant fell the finish of the stairs was exposed granite aggregate. And the Court is not satisfied, on a balance of probabilities, that there was a non-slip finish or a monolithic non-slip surface to the stairs at the time of the accident.

[40] Mr. Payne also testified that the janitorial staff were requested to place a wet floor sign inside the building by the exit to the eastern stairway. His reason for so doing “was to alert [persons leaving] that the steps were wet because they were uncovered”. This is not specifically pleaded in the Defence. (See para. 5 of Defence). However, paragraph 6 of his witness statement states in part that:

“On the date in question, the janitorial contractors had erected “wet floor” signs inside of the food court near the exit through which the [Claimant] had just exited”.

[41] Mr. Payne was unable to confirm that the wet floor signs were in place when the Claimant made her way to the exit. The Claimant’s evidence is that there were no wet floor signs inside the food court, and that she saw no janitorial

persons. Furthermore, Mr. Payne admitted that there were no signs indicating that the steps were wet, and that there was no sign outside the building. It is significant that Mr. Payne appreciated the necessity to warn visitors leaving the building that the eastern stairway was uncovered and wet. However, the signage used was woefully inadequate for that purpose.

[42] The Claimant slipped and fell as she descended the second flight of stairs. The Court accepts her evidence that she used the handrail to assist her while descending the stairs. The Court finds that where the Claimant walked was wet and slippery. Mr. Hinds agreed in his oral evidence that the corners of the steps, where he and the Claimant descended, were slippery. He also spoke of water on the steps.

[43] There is no evidence that the Claimant's fall and subsequent injuries were caused by her weight, or her left flat foot, or the shoes that she was wearing. The Claimant's injuries were caused when she slipped and fell on a wet and slippery uncovered stairway on the Defendant's premises.

[44] At paragraph 9 of his witness statement Mr. Payne deposed that:

“It had been raining outside earlier that day, and while the stairs had all but dried, they were still wet nearest to the wall”.

This witness also conceded in his oral evidence that it was usual for the centre of the stairs to dry first, and that the sections nearest the wall remained wet

for a longer period. The incident report prepared by Lincoln Bayne confirmed that the steps were wet when the Claimant fell.

[45] As the General Manager of Sheraton Centre, Mr. Payne informed this Court that part of his responsibilities included ensuring that the premises are safe. He was “concerned with the best safety options for visitors”. In this capacity, he was aware of several factors that could impact on the safety of visitors traversing the eastern stairway. He knew that the uncovered stairway got wet when it rained. And to this end he assumed that a wet floor sign, inside the building, would be a sufficient caution. He was mistaken for reasons outlined earlier. (See para. [41] *supra*). The Defendant had no system in place to warn visitors about the wet steps.

[46] Mr. Payne was aware that the steps dried out first in the middle, although he sidestepped any definitive statement as to whether it would be safer to use a centre rail where it is dry, than to use the rail nearest to the wall where the stairs were wet. He knew that there was no centre rail that would give visitors an alternative rail assisted path over the dry centre area.

[47] It was to Mr. Payne’s knowledge that the outer sides of the stairs remained wet longer, and offered the only rail enhanced parts of the stairs. He also knew that when rain fell on the uncovered stairway, visitors wishing the assistance of the rails for ascent or descent had to traverse wet areas of the stairway.

- [48] Knowing full well, through its General Manager and other employees, that the middle of the stairs dried out first, the Defendant never saw it fit to install a centre rail on the eastern stairway until the 2010 renovations. When the Claimant exited the building onto the stairway, the centre of the stairs were dry. But the Defendant had not provided her with the option of a handrail over the dry central area of the stairs. She was forced to use the handrail to traverse the wet and slippery corners of the stairway nearest the wall.
- [49] In these circumstances the Defendant breached its common law and statutory duty of care to the Claimant. This negligence was compounded by the absence of any appropriate cautionary signage either inside or outside the building. Knowing that the centre of the stairway dried out first, it was obvious and foreseeable that a visitor using the stairs after rainfall could only rely on the assistance of the handrails along the wet corners of the stairs.
- [50] It was equally foreseeable that the presence of a centre rail would afford a visitor, like the Claimant, an assisted alternative route over the dry part of the stairway. The Claimant slipped and fell on the wet and slippery side of the stairway, handrails notwithstanding. She was not afforded the option of a centre handrail over the dry part of the stairway.
- [51] Also of significance is Mr. Payne's evidence that the eastern stairway was remodelled in 2010, with the addition of a centre handrail. In **Victoria Mutual**

**Building Society v. Berry, CA. Ja., Civ. Ap. No. 54 of 2007, decision dated 31 July 2008**, the respondent fell while conducting business on the appellant's premises. Speaking for the Court of Appeal, Harris JA opined that:

“The evidence discloses that the step was replaced by a ramp with handrails. It could be that the step was unsafe and that at the time the respondent fell, it was incumbent on the appellant to have taken such care as required to have made it reasonably safe for all visitors, including the respondent”. (Para. 25 of judgment).

[52] The learned Justice of Appeal expanded on this view of the evidence. He continued that:

“The fact that the appellant carried out a remodeling exercise subsequent to the respondent's fall, makes it obvious that it was aware that the step posed a substantial risk to all persons who lawfully traversed the building. A clear inference can be drawn that the step was dangerous...The learned judge's finding that the short step was dangerous, and the appellant's subsequent replacement of it by a ramp with rails, is not without merit. I see no reason to interfere with these findings”. (Para. 30).

[53] This Court finds that the corners of the stairway in this case, were wet and slippery when the Claimant slipped and fell. The uncovered stairway was exposed to the elements, and this part of the stairway became dangerous to visitors when wet. The reasonable inference is that the addition of the central handrail and covering of the stairway in 2010, was a recognition by the

Defendant that there was a safer alternative.

[54] The evidence of the expert Mr. Oxley emphasised the need for a centre handrail as a requirement of the building Code. The eastern stairway at Sheraton Centre was built between July 1997 and April 1998. Therefore the relevant Code was the 1993 edition. Paragraph 3.510.2 of that Code provides that:

“Handrails shall be provided as follows:

- (a) “STAIRWAYS - at a height of 865 mm above the line of the treads and the floor of the landings –
  - (i) ...
  - (ii) ...
  - (iii) intermediate handrails where the width of the stairway exceeds 2.2 m, dividing the stairway into 2 or more lanes each not more than 2 m wide”.

[55] The Court accepts Mr. Oxley’s evidence that the eastern stairway was wider than twelve feet. It follows then that the stairway was wider than two metres, and was not built in accordance with the existing guidelines or standards. The stairs were not divided by a middle handrail.

[56] Mr. Oxley explained the rationale for the standards for handrails in the 1993 edition of the Code. (See para.[32] supra at subpara.8). In addition, he was of the considered opinion that an individual:

“...would be unable to stabilise himself if the person tripped. Two handrails would be needed to stabilise himself...There is need for a second handrail ...because the person falling may need the other handrail”.

[57] Although the Code does not have the force of law in Barbados, it indicates the standard of care that the Defendant owed to all visitors to its premises. In **Moira Japp v. Virgin Holidays Ltd [2013] EWCA Civ 1371**, the appellant was injured in September 2008, while on holiday at a hotel in Barbados. She had walked into a sliding glass balcony door in her room, that shattered and caused lacerations to her body. The Court of Appeal in England held that there was a duty to comply with the local standards existing in Barbados at the date of construction. The Barbados Code represented the local standard, and a breach of the Code was a breach of the duty owed to the appellant.

[58] This Court is satisfied that at the time the eastern stairway was built at Sheraton Centre, persons in the construction industry in Barbados were familiar with the 1993 edition of the Code. Indeed, it is the evidence of Mr. Oxley that:

“[The Code] was readily available in Barbados for some time. It was widely used especially among larger construction companies...I interfaced with several construction companies that used the Code...In my opinion it is the custom and practice for the [Code] to be followed as far as large projects and large construction companies...I am aware that

around 1998/99 the [Code] was in very common use”.

[59] The Court also finds that the Defendant failed to comply with the local building standards when the eastern stairway was constructed. Despite the existence of a centre handrail on the architectural drawings, a deliberate decision was taken not to incorporate this safety design feature into the eastern stairway. The failure to incorporate a centre handrail constituted a breach of the duty of care the Defendant owed to visitors to Sheraton Centre. The absence of a centre rail denied the Claimant a choice to walk over the dry areas of the steps. Additionally, she was unable to grab a handrail to her left so as to brace herself from falling after she slipped.

[60] Counsel for the Claimant urged the Court to take into consideration the public liability reports for four individuals who fell on the steps prior to the incident with the Claimant. Counsel contends that “The existence of previous falls on the premises of the Defendant should serve to alert it that the steps were a danger to visitors to the Defendant’s premises”. (Para. 159 of Written Submissions filed on 07 April 2014).

[61] The reported falls occurred between 1998 and 2000 on the eastern stairway. Only one of the falls was on a wet surface. And none of the information provided in relation to the falls is sufficient for this Court to draw any inferences with respect to the Defendant’s negligent culpability or liability.

There was no demonstrated connection between these falls and any negligence on the part of the Defendant. All that may be said is that the Defendant was aware that individuals had fallen on the stairway previously. It cannot be said that these individuals fell in circumstances that made the Defendant aware that the steps, whether wet or dry, were a danger to visitors to Sheraton Centre.

[62] The Court is also unable to give any weight to Mr. Hinds' observation of another person falling on the wet stairway after the Claimant slipped and fell. The Court has no information or details about that person's fall from which to infer that the fall was the direct result of the wet steps.

[63] As noted previously, it is for the Defendant to prove that the Claimant contributed to her injuries. (See para. [18] supra). The Defendant is required to establish, on a balance of probabilities, that the Claimant either failed to look where she was walking; or failed to hold on to the handrail properly or at all or to take any other sufficient step to avoid falling; and failed to observe that the step or steps were wet.

[64] In **Re H (Minors) [1996] AC 563**, Lord Nicholls opined that "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not". (At p. 586; see also **David Foster v. Container Services**

**Limited et al, CV No. 0052 of 2012, Hgh. Ct. B'dos, Civ. Div., decision dated 25 June 2020** per Alleyne. J at para. [33]). There is no evidence before this Court that rises to the standard required to establish any contributory negligence on the part of the Claimant.

### **Assessment of Damages**

#### **(1) The Medical Evidence**

[65] The physical injuries suffered by the Claimant were mentioned earlier. (At para. [7] supra). The Claimant was first assessed by Dr. Randolph Carrington, a trauma and orthopedics specialist. Dr. Carrington diagnosed a traumatic right patella alta or ligament rupture with soft tissue injury to the left arm. There was no bruising, abrasions or lacerations to this arm. The left arm injury was classified as a minor injury.

[66] As a result of the injury to her left knee, the Claimant “was unable to straight leg raise and there was an exquisite tenderness at the right patella...”. She was given an analgesia and her right lower limb supported in a plaster cast. Dr. Carrington recommended further exploration and reattachment of the patellar ligament when the Claimant returned to England.

[67] An MRI of the right knee was undertaken on 19 June 2003. It revealed the patella high in position with a complete rupture of the patellar tendon. A small tear extended to the inferior articular surface of the frontal horn of the medial

meniscus. Soft tissue oedema was noted around the knee joint, with some fluid at the lateral aspect of the anterior patella.

[68] The operation to repair the ruptured right patellar tendon occurred on 21 June 2003. The operation record described a patellar tendon in shreds with a complete rupture of associated tissue. Several follow up appointments are recorded for physiotherapy and hydrotherapy sessions.

[69] The Claimant continued her post operative care with Dr. S. H. Yu. This doctor died in October 2008, and care was continued by his associate and brother Dr. Ma Hung Yu. Prior to his death, the first Dr. Yu prepared a report that was faxed on 15 May 2006. He explained that:

“...[The Claimant] sustained a ruptured right patella and tendons injury which was severely shredded in three places...she had surgery to repair the damage to her right knee.

This was performed with reinforcement with wire loop and full plaster cast applied. The wire loop became prominent and she subsequently had to have partial removal of the loop in June 2004. [The Claimant] had an extensive course of physiotherapy and hydrotherapy post plaster cast removal until May 2004.

Though [the Claimant] has made a reasonably good recovery, unfortunately the injury has subsequently left her unable to resume the normal activities such as running or going to the gym. This has made a profound difference to her physical well being as she has gained a considerable amount of weight,

which being asthmatic is not medically good for her.

She regularly has to take analgesia and has become rather anxious and distressed about the long term effect this could have on her”.

[70] On 26 August 2010, Dr. Ma Hung Yu reported that the Claimant post surgery was having intermittent pain; had been immobile and gained excessive weight; and currently suffered from depression and was on medication. His opinion was that “The excess weight gain is impinging on her mobility and also causing further pain to her knee”.

[71] Dr. Ma Hung Yu submitted a further report dated 15 December 2011. This is eight years after the Claimant sustained the knee injury. He informed that;

“[The Claimant] tore a ligament and tendon in her right knee. She had fusion of the knee and wire inserted 3 days after the accident...

She had part of the wire removed on the 20 June 2004 to ease sensitivity and pain caused by swelling. The remaining wire is still in situ. Swelling still persists, causing the right knee to be bigger than the left knee.

Since the accident [she] experiences a lot of pain, and takes analgesics constantly throughout the day to try to ease this. At times she cannot even stand up due to the severity of the pain. As she has had to refrain from taking any form of exercise in order to minimize pain in her right knee, [her] weight has increased since the accident. The weight gain and constant pain pushed [her] into depression 2 years ago; she lost her self-confidence, has very low self-

esteem, and has had psychological counselling which she plans to continue.

She is taking antidepressants – Citalaprom 20gm, increased from 10 mg and up to 3 types of analgesia daily to control the pain: Tramacet 100mg every 4-6 hours, Paracetamol 500mg 2 tablets 2-3 times per day for breakthrough pain, and if still in pain and can't sleep, Ibuprofen 400mg as well. She also undergoes physiotherapy twice a month”.

[72] Dr. Ma Hung Yu gave evidence by video link on 13 March 2014. The Court heard from the examination in chief that:

“[The Claimant] still struggles with weight, and cannot exercise because of her knee. The knee is painful. She cannot bear weight with the right knee. She has difficulty climbing and ascending stairs. The problems are making her depressed. She continues medication; uses an antidepressant... This has been my observation. She has low mood, sleep problems, low appetite, binges (bad eating habits), altered sleep habits, classical indication of depression. She is in pain and lost interest in her leisure activities. She has poor or no appetite.

I have been in the practice of obstetrics and gynecology for 20 years. The symptoms of depression are the same whether post natal or other circumstances of life”.

[73] Probing cross examination by counsel for the Defendant elicited evidence that the Claimant complained of knee, hip and back pain in January and March 2012. On a third occasion in 2012 her antidepressant medication was reviewed. She exhibited no interest in doing things, and she was in pain. This doctor admitted that prior to his diagnosis of depression, he had not subjected

the Claimant to any specific test. He conceded that there was a written test being used from 2011, but the Claimant did not take this test.

[74] Dr. Yu's evidence continued as follows:

“Her depression was ongoing for several years because of her knee problem.... In the past [my assessment] was based on her history and clinical diagnosis.

...When she became a patient in 2004 she weighed 127 kilos. Her most recent weight is 128 kilos in 2008. Between 2004 and 2008 she has not lost any weight. She gained 1 kilo...

The third paragraph last sentence of my brother's letter is not a diagnosis of depression, but it is leading towards depression.

I first prescribed an antidepressant on 30 April 2010. I was seeing her from 2008. Her condition became such that I prescribed an antidepressant for the very first time. The most recent prescription for an antidepressant is 31 December 2013. 28 tablets were prescribed. These would last for 4 weeks. I never recommended her to an expert in depression. She has intermittent pain and discomfort in the knee. Intermittently the pain level goes up....

She could exercise her upper body...

Depression can affect studies”.

[75] According to the medical evidence, by 2006 the Claimant had made a good recovery. But she was unable to resume normal activities such as running or going to the gym. (See Dr. S.H. Yu's report at para. [69] supra). By 2014 Dr.

Ma Hung Yu described struggles with weight gain, inability to exercise, inability to bear weight with the right knee, difficulty climbing and ascending stairs, several years of depression, and intermittent pain and discomfort in the injured knee with fluctuating levels of intensity.

[76] Noticeably, none of the medical reports point to a resolution of the Claimant's challenges over a specific period of time. Neither do the reports assist with a prognosis. They did not indicate a degree of permanent disability, if any. The Court does not know whether pain will be the Claimant's companion for the remainder of her natural life. Nothing in the reports suggest that her work life will be negatively impacted.

[77] Indeed, there is no medical assessment of the Claimant's life expectancy, or of the anticipated quality of her life during that life expectancy period. For example, is osteoarthritis a possible later development in the injured knee? The absence of such critical evidence may impact negatively on any assessment of general damages.

## **(2) Pain Suffering and Loss of Amenities**

[78] The one constant feature of the Claimant's knee injury is pain. From the time she fell she experienced pain in her right leg. She was on the ground screaming and in pain. According to her great aunt, she cried and screamed all the way to the hospital. After her initial contact with Dr. Carrington, analgesias have

been a part of her daily routine.

[79] The Claimant was hospitalized for one to two weeks after returning to England. After her hospitalization, she had to be assisted by her mother and her great aunt. Her great aunt returned to Barbados in early August 2003. The Claimant was unable to walk initially and relied on crutches for about eleven months after surgery.

[80] Post surgery in England the pain was “extremely acute”. A second operation was necessary to remove a loop wire that was inserted during the first operation. This was to ease the sensitivity and pain caused by swelling. A year after the knee injury the Claimant continued to experience excruciating pain in her knee, and she had difficulty standing for long periods of time. She described constant pain and medication, and an itching stinging sensation in her kneecap.

[81] The knee injury was traumatic and life changing for the Claimant. She deposed in her witness statement that:

“Prior to my injury I enjoyed a fairly active social life but since that accident I had to give up walking and attending the gym which I previously did twice weekly. While I was undergoing rehabilitation I had to give up shopping with my friends, clubbing and dancing which I had done at least once every weekend. Even going down stairs is traumatic as my leg pops out and I have been mocked by other

students because of the way I go down the stairs. I still get a pins and needles feeling in my leg”. (Para. 32 Witness Statement).

This evidence was confirmed by her mother, and it was not challenged by the Defendant.

[82] The Claimant expressed concern about her excess weight, which hampered her mobility and caused further pain to her knee. Attempts to attend the gym failed because “sometimes I cannot walk after a workout and then my knee starts to swell and I have to keep it elevated”. She is unable to afford a personal trainer to assist her with losing about 100 pounds. The Claimant has gone up four dress sizes since the injury.

[83] The surgery left the Claimant with an unsightly eight inch scar. This has caused her to stop wearing skirts and dresses. She is fearful of having her leg touched or knocked, and her right knee is visibly larger than her left knee.

[84] The Claimant gave evidence of feeling defeated and low. Her social life became virtually non existent, and she only goes to places where she can sit down. She spoke of a nervous breakdown in January 2010. The medical evidence is that at the end of 2013 the Claimant was using an antidepressant. Her problems were making her depressed, she experienced low mood, sleep problems, low appetite, binges (bad eating habits), altered sleep habits, the

classical indicators of depression. She was in pain and had lost interest in her leisure activities. The Court accepts the medical diagnosis of depression associated with the restrictions caused by her injury. The depression also hampered her studies, and it is not too remote, bearing in mind that her painful episodes continued for many years after her injury.

[85] The Claimant was 19 years of age when she fell and injured herself. Many of her youthful experiences were curtailed as a result of the injury. With perseverance she managed to complete a university degree, but this was not without some physical and financial challenges. Eleven years after the accident the Claimant continued to take antidepressants and painkillers daily, and she cannot stand for long periods of time. Her knee swells when she walks, and the leg has to be elevated.

[86] Household chores have become a challenge for the Claimant. She is unable to kneel or stand for long periods. She cannot reach overhead with ease, and does not see herself able to live alone in the near future. When asked about the possibility of having her own family, the Claimant expressed reservations about interacting with young children because of her injury.

[87] Counsel for the Claimant proposed \$200,000.00 for the knee injury, \$30,000.00 for the scar, an uplift of \$120,000.000 for depression, and a further

\$10,000.00 for loss of enjoyment of holiday. Given the overlap between these heads, a 10 percent discount was proposed based on **Weekes v. Chief Medical Officer et al, Civ. Suit No. 207 of 1998, HC B'dos, decision dated 22 February 2010**. The overall discounted sum claimed for pain, suffering and loss of amenities is \$324,000.00.

[88] Counsel for the Defendant is of the view that an award of \$105,000.00 for pain and suffering, and \$525.00 for loss of enjoyment of holiday would be adequate. It was argued that no award should be made for depression as the Claimant was not tested for depression, and there is no evidence of psychiatric intervention. According to Dr. Ma Hung Yu's evidence, the Claimant went into a depression about two years prior to his report of 15 December 2011. This is before tests were being administered. The Court also accepts that as a gynaecologist, this doctor was qualified to diagnose depression, because the symptoms of depression are the same whether postnatal or from other circumstances of life. There is also evidence that the Claimant was seen by a psychologist.

[89] The Court makes the following awards under the head of pain, suffering and loss of amenities:

(1) Knee injury \$135,000.00, using **Waller v. Courage** and **Hardy v.**

**Daldorph** as guides. (Kemp & Kemp “The Quantum of Damages” Vol. 3, para. 12-405 (1988), and para. 12-412 (1990)).

- (2) Depression, bearing in mind that there is no evidence that depression has hampered the Claimant’s work life, \$50,000.00
- (3) Scarring \$25,000.00.
- (4) Loss of enjoyment of holiday; approximately 3 days of a two week birthday holiday spent with friends and family. The evidence does not support the level of award made in **Middleton v. Elliott, Civ. Suit No. 748 of 2001, HC B’dos, decision dated 11 December 2003**; \$3,000.00.

The overall award here, when discounted by 10 percent is **\$191,700.00**.

### (3) Special Damages

[90] The claim here is for a total of \$36,116.20, however, the Defendant argues that the award should be no more than \$9,489.53. The Defendant does not object to the expenses totalling \$3,846.20. However, the Defendant is unable to accept either the transportation or prescription costs. The Defendant alleges that there are no receipts for the transportation costs claimed.

[91] The Court accepts that given the nature of the Claimant’s injuries it was foreseeable that she would require selective transportation in the initial stages of her injury. No receipts were provided for her travel to and from follow up treatments. Exhibit LM9 however confirms that the Claimant attended 18 hydrotherapy and physiotherapy appointments.

[92] Exhibit LM10 is offered as evidence of other appointments. However, the

Court notes from the Claimant's evidence that she was hospitalized for about two weeks from 17 June 2003. Therefore, any reference to appointment dates prior to 01 July 2014 cannot be considered for transportation costs. Five dates are mentioned after 01 July 2014. The Court also accepts the Claimant's oral evidence that she paid £11 per round trip for 23 therapy and medical appointments ie. £253 or \$885.50.

[93] Likewise the Court does not dispute the expenditure for travel to and from Enfield College. The Enfield College trips are calculated by the Court at approximately 16 round trips per month between September 2004 and June 2005, ie. 112 round trips. 24 round trips are then subtracted for 3 two week periods to cover Christmas and Easter holidays, exam periods and days missed because of pain. This gives a total of 98 round trips at £13 each. The cost of transportation to college was £1,274.

[94] The Court's difficulty with the travel claim for Middlesex University is that there is no evidence as to the number of days per week that the Claimant travelled to classes. The calculations submitted speak to four trips per week, but this is not supported by any evidence from the Claimant. The receipt at Exhibit LM11 does not confirm that the Claimant's travel expenses were connected with travel to university.

[95] There is another supervening difficulty with the travel expenses claimed for college and university. Although it is self evident that the Claimant travelled by taxi because of her knee injury, there is no evidence that she incurred a loss by so doing, or the extent of her loss. In the normal course of things the Claimant would have been responsible for transportation costs associated with her studies. There is no evidence that she would have chosen other cheaper options. Additionally, there is no evidence that transportation by train or bus would have been cheaper. Even if there was such evidence, the Claimant would only be entitled to the difference between the cheaper form of transport and any higher cost incurred because of her injury.

[96] Without an evidential foundation, the Court is hard pressed to make an award for college and university taxi fares in circumstances where the exact loss has not been proved either through oral or documentary evidence. The Court calculated the college travel expenses based on the evidence at £1,274 or \$4,459.00. The university expenses claimed are £1,170 or \$4,095.00.

[97] The Court assumes that travel by taxi is more expensive than travel by train and/or bus. But there is still the evidential gap with respect to the actual loss incurred by the Claimant. In these circumstances, the Court is prepared to make a discretionary award of \$5,000.00 for college and university travel

expenses. The Court also notes that the Defendant was prepared to accept £1,339.00 for transportation costs to Enfield College. (See Written Submissions filed on 17 April 2014 at pages 79-80).

[98] Part of the special damages claimed is \$12,768.00 for prescription costs over 10 years. The Defendant objects to this claim on the basis of a lack of evidence to support bare allegations “which do not form part of the Claimant’s pleaded case and are not included in her prayer for relief”. (See paras. 2370 -2370 of Defendant’s Written Submissions filed on 17 April 2014).

[99] Rule 8.7 (5) of the Supreme Court (Civil Procedures) Rules, 2008 provides that in personal injuries claims, “The claimant must include in, or attach to, the claim form or statement of claim a schedule of any special damages claimed”. Paragraph 5 of the Statement of Claim includes transportation in the particulars of special damage. In addition, the Claimant’s list of documents included her treatment attendance record, and a letter from a cab company. (See Part I, Schedule A, documents 28 and 30).

[100] The Claimant also gave notice in the Statement of Claim, that she would be seeking leave to adduce further evidence of special damages at the trial. While prescription costs are not particularized in the Statement of Claim, during trial counsel for the Claimant sought leave to add future prescription expenses to

the pleadings together with evidence of a personal trainer. Leave was granted for the Claimant to submit a schedule of future expenses by 15 January 2015.

No such schedule has come to the attention of the Court.

[101] Harvey McGregor Q.C. in the seminal text “McGregor on Damages”, observes that:

“On a strict view, the claimant will be debarred from proving special damage not only where he fails to plead it at all but where he fails to plead it with sufficient particularity. Sufficient particularity normally requires that specific instances should be pleaded....

In modern times, however, the tendency is to adopt a more lenient approach and to allow a claim for special damage to be proved provided that the existence of such a claim is clear from what is now the statement of case”. (18<sup>th</sup> ed.at paras. 44-017 to 44-018).

[102] Unfortunately, there is no pleading in this case for either past or future prescription costs. The pleadings were never amended to include this claim in the special damages. And unlike the claim for transportation costs, there is nothing on which the Court could reasonably infer a claim for prescription costs. There will be no award for the prescription costs that are included in the submissions for special damages. (See para. 231 of Written Submissions filed on 07 April 2014.)

[103] The award for the following special damages is **\$9,731.20** assessed as:

- (1) Expenses \$3,846.20.
- (2) Travel by cab for therapies and medical appointments \$885.50.
- (3) Travel to college and university by cab \$5,000.00.

**(4) Loss of Earnings**

[104] Loss of earnings is a specie of special damages. Counsel for the Claimant has chosen to address it separately. The claim is for pay and overtime lost between 2003 and 2005, as a result of the injury. The Claimant indicated in her witness summary that:

- “ 30. At the time of the accident I was employed at J. Sainsbury’s supermarket where I had been working since 30<sup>th</sup> June 2001. I worked at the checkout counter serving customers, operating the till and handling grocery items. My salary was £303.00 per month. I worked approximately 6 hours of overtime each month with an average remuneration of £34.74. A bundle of copies of 21 pay slips are now produced and marked Exhibits “LM 12”.
- 31. As a result of my long absence from work I was subjected to an interview by the Human Resources Department. I subsequently returned to work but was only able to do the allocated hours and no overtime which greatly reduced my earnings. I was not able to get sick pay from work because I do not pay taxes as a student and the few pence that I paid in national insurance did not entitle me to sick pay”.

[105] According to the receipts provided by the Claimant, she was paid wages for

the months of June and July 2003. The June 2003 receipt includes overtime pay and sick pay in the total gross pay of £232.67. She received no wages or overtime from August 2003 to June 2004, except for £30 in December 2003, £209.05 in April 2004, and £10.58 in June 2004. Basically, the Claimant did not generate wages for approximately 11 months.

[106] The Claimant informed the Court that her average income from her Sainsbury job was £303 per month. Only one pre accident receipt was produced for July 2001. The next receipt is for June 2003, the month in which her injury occurred. This receipt indicates year to date cumulatives, and her taxable pay for the year was £712.24. The Court draws two inferences from the receipts. First, Sainsbury's tax year runs from 01 April of one year to 31 March of the following year. This conclusion is drawn from the receipts for 02 April 2004 and 30 April 2004, where the first receipt refers to 52 tax weeks, and the second receipt refers to 4 tax weeks.

[107] The second inference, (or perhaps more appropriately a finding of fact), is that overtime pay is included in the total gross pay for the month. Therefore, using the wage receipt for 25 July 2003, the Court is able to determine the Claimant's average pay with overtime for the first 16 weeks of income year 1 April 2003 to 31 March 2004. Dividing the taxable pay of £1,058.97 by 16

weeks gives an average weekly pay of £66.19.

[108] It follows that for 48 weeks or 11 months from the beginning of August 2003 to the end of June 2004, the Claimant's income would have been approximately £3,177.12. After deducting £249.63 for the three payments received in December 2003, April 2004, and June 2004, the Court arrives at a figure of £2,927.49, or \$10,246.22, as representing the Claimant's loss of income and overtime.

[109] The receipts produced do not support the Claimant's oral assertion that she received no overtime from June 2004 to September 2005. There is evidence of overtime recorded in July, September, October and December 2004. Sick pay is also recorded for three of these months. No pay slips were produced for any period after December 2004. There is, therefore, no sufficient evidential basis on which to award an additional sum for loss of overtime.

[110] The Court awards **\$10,246.22** for the Claimant's loss of income and overtime.

#### **(5) Past Domestic Assistance**

[111] Past domestic assistance is another head of special damages. Claims are permitted for the gratuitous care of family members or friends who assisted the injured Claimant. In this case it is the Claimant's great aunt Vivian Garrett, and her mother Patricia Marbell. The Court has to determine the extent of the

care in each case, and the appropriate rate for such care.

[112] Ms. Garrett is a nurse by training and certification. She stayed with the Claimant during her 3 night hospitalisation in Barbados from 13 to 16 June 2003. She deposed in her witness statement that:

“I visited [the Claimant] every day. [The Claimant] was very uncomfortable in the hospital and was given pain medication. She was unable to walk or get out of bed and she was catheterised as she was not able to go to the bathroom. The nurses at the hospital bathed her and combed her hair and I assisted them and helped her take care of her other hygienic needs”. (Para. 10).

[113] During her cross examination Ms. Garrett added that:

“[The Claimant] spent 3 nights at the QEH. I stayed with [the Claimant]. I helped to administer the care and [the Claimant] got the care that any other person would have had. I stayed with her throughout the night”.

[114] Ms. Garrett accompanied the Claimant on the flight to England and provided nursing care. She administered injections for pain, attended to the catheter and the Claimant’s personal needs. While the Claimant was hospitalized after her first surgery, Ms. Garrett visited her daily and assisted with her personal hygiene.

[115] Ms. Garrett remained in England until 04 August 2003. During that time she assisted with the Claimant’s care while her mother was at work. The

Claimant's mobility was severely restricted, and Ms. Garrett attended to her personal hygiene, bathing and also cooked.

[116] The claim for 13 to 16 June 2003 is \$200.00 at \$50.00 per day for 4 days. Given that the Claimant's injury occurred on the evening of 13 June, and that she left for England on 16 June, a reasonable award is for 3 days at \$50.00 per day ie. \$150.00.

[117] The Claimant exhibited at LM8 the National Health Service Professionals Pay Rates for North Middlesex. The Court accepts this as a guide for professional rates in its determination of a reasonable assessment for the period after the Claimant arrived in England, until Ms. Garrett's departure on 04 August 2003.

[118] Prior to surgery, and immediately thereafter, Ms. Garrett again assisted with the Claimant's personal care. At that stage, the Claimant's primary care givers were the doctors and nurses at the Middlesex hospital. When the Claimant went home, Ms. Garrett took on an enlarged role as her primary care giver from about 05 July 2003, until Ms. Garrett's departure on 04 August 2003.

[119] During the Claimant's hospital stay, Ms. Garrett's voluntary services were at the level of a first tier care support worker. She did not perform the services of a registered nurse. The Court considers that an hourly rate of £7.36 for

approximately 2 hours per day for 14 days would be adequate, ie. £206.08 or \$721.28.

[120] Ms. Garrett took on the major responsibility for the Claimant's personal care after she left hospital until Ms. Garrett returned to Barbados. Her assistance during the day included cooking and washing. Again, these are the duties of a care support worker at the higher end. The period covered is 34 days from 01 July to 03 August 2003 for about 8 hours per day at the rate of £8.55 per hour. The calculation gives £2,325.60. This figure will be discounted by 25 percent, taking into consideration that the services were voluntary, and that the Claimant's mother may have taken over her daily care during her off days. The award here is £1,744.20 or \$6,104.70.

[121] The final calculation in relation to Ms. Garrett is for services she provided between 16 and 17 June 2003. The Court is of the view that the pay guide does not assist with the calculation of an appropriate payment for the on board services she rendered during the Virgin Atlantic flight to London. Her training and skills as a registered nurse were utilized for the duration of the flight. She administered injections for pain, monitored the Claimant's catheter, and was fully responsible for the Claimant's nursing care. The time spent was not only the approximate 8 hours for the flight, but includes time prior to boarding the

flight, and then deplaning into the ambulance to Middlesex Hospital.

[122] The Claimant could not travel alone, and she did not use an air ambulance. Therefore, the in flight nursing services provided by her great aunt cannot be considered to be the norm. The guide indicates that a maximum rate for a registered nurse is £19.70 per hour for Sundays or Bank Holidays. The Court considers that an hourly rate of £20 for approximately 10 hours would not be unreasonable. £200 or \$700.00 is awarded for this period, and no discount will be applied.

[123] Patricia Marbell is also a qualified nurse. She was fully responsible for the Claimant's at home care from 04 August 2004. Ms. Garrett's evidence was that: "The Claimant improved a lot by the time I left, but the mother [would] still have to do things and fill in". The Claimant's evidence to the Court is that she improved by early to mid 2004 when she started walking again. Additionally, she revealed during cross examination that when she returned to college, she had "recovered to the extent that I did not need my mother's assistance".

[124] There is no evidence that the Claimant's mother gave up her job in order to attend to her daughter's needs. Her assistance was required to a lesser extent than Ms. Garrett for about a year from June 2003 to June 2004. A reasonable

award would be in the range of £8.55 per day for approximately 4 hours per day over 35 days. That is £12,483.00 of \$43,679.50, discounted by 25 percent to \$32,767.88.

[125] As a direct result of the Claimant's injury, her mother took on the major responsibility for their household chores. The evidence is that previously they shared these household chores equally in terms of cooking, cleaning, laundry and grocery shopping. No evidence was offered as a guide in the calculation of basic domestic tasks.

[126] Cornelius J considered past domestic assistance, in the context of a leg injury, in **Marshall v. Abacus Builders, No. 1020 of 2011, H.C. B'dos. Civ. Div., decision dated 05 February 2015**. She determined that a commercial rate of \$40 per day was reasonable. (See also Beckles J. in **Husbands v. Ministry of Public Works and Transport, Civ. Suit No. 0247 of 2009, H.C. B'dos., decision dated 18 March 2020**, at para. [63] of judgment). In this case the domestic assistance was rendered by a close family member, who was already responsible for sharing the household chores equally. In these circumstances, the Court considers that any award should be discounted by 25 percent. The Court is of the view that reasonable compensation for past domestic assistance should be \$30 per day for 2 days per week for approximately 10 years. The

award is \$31,200.00.

[127] The award for past domestic assistance is \$71,643.58 as follows:

- (1) Ms. Garrett \$7,675.70 comprising:
  - (i) 13 -16 June 2003, \$150.00.
  - (ii) 16 -17 June 2003, \$700.00.
  - (iii) 18 June - 01 July 2003, \$721.00.
  - (iv) 01 July - 03 August 2003, \$6,104.70.
  
- (2) Ms. Marbell \$63,967.88 comprising:
  - (i) June 2003 - June 2004, \$32,767.88
  - (ii) June 2004 - March 2014, \$31,200.00.

#### **(6) Other Claims for General Damages**

[128] The remaining claims for general damages are handicap on the labour market, future domestic assistance, future transportation costs and gym membership. There is no claim for future medical or future prescription costs. As noted above, the Court has no medical prognosis to assist it with these areas of claim. (Supra at paras.[76] and [77]).

[129] In considering an award for handicap on the labour market, the essential question for the Court is whether the Claimant's knee injury has reduced her earning capacity. Put another way, is there a real risk that the Claimant could lose her job as a result of the injury. (See "McGregor on Damages", supra at

para. [101] at paras. 35-095 to paras. 35-099).

[130] The Claimant's evidence in chief about her job prospects is that:

“There is a possibility I could lose my job in the future. To find another job I would have to be sensible and consider the suitability of standing long periods of time. I would have to consider if I could sit”.

[131] In cross examination the Claimant shared that:

“June [2014] would be 13 years working with Sainsbury. I have seen employees come and go. I am now a phone shop consultant. The duties entail selling phones and giving advice.

I think there are 9 of us altogether. I think I have been there the longest. Some come from different stores.

I have thought about losing my job at Sainsbury either from sick leave or if they thought I was no longer fit for them. I am unsure how often I take sick leave. I am not sure how they would find me not fit.

I have no other particular fears about losing my job”.

[132] At the time of her injury the Claimant was employed as a cashier. She continued to work with the same employer with a change in responsibilities. There is no cogent evidence that her wages have been reduced because of the injury, or that she is in any real danger of losing her job for that same reason. Also lacking is any medical evidence that her injury will impair her present

or future job prospects. As a result no award is made for a handicap on the labour market.

[133] The challenge with the claims for future domestic assistance and future transportation costs is that the Court has no expert evidence as to whether the Claimant will fully recover in an estimated time period, or whether she will endure any degree of permanent disability. The Court is unable to determine how long the Claimant might require domestic assistance and/or transport in the future. Regrettably, no awards are made under these heads of claim.

[134] With respect to the claim for gym fees and a personal trainer, the Court accepts the medical evidence that the Claimant is overweight as a direct result of her injury. It would not be unreasonable for the Claimant to undergo professional assistance in order to achieve an optimum weight. This would reduce the load on her injured knee. No invoice was exhibited from a gym or a personal trainer. However, the Court accepts the evidence that gym costs are £44 or \$154.00 per month, with a £35 or \$122.50 joining fee. The personal training at the gym is said to start at £30 or \$105.00 per hour. (See para.35 of Witness Summary). The Claimant's oral evidence is that she wished the services of a personal trainer 2 to 3 times per week until she is 100 pounds less in weight. But she was unable to say how long it would take to reduce her weight by that

amount.

[135] The Court awards **\$18,350.00** for gym membership with a personal trainer to cover 3 one hour sessions per week for one year. The award comprises \$1,848.00 as gym fees for 1 year, \$122.50 as the joining fee, and \$16,380.00 for the personal trainer.

### **Disposal**

[136] Judgment is entered for the Claimant.

[137] The Defendant shall pay the Claimant the following sums as general and special damages:

#### **General Damages**

(1) Pain, suffering and loss of amenities	\$191,700.00
(2) Gym membership	\$ 18,350.00

#### **Special Damages**

(1) Expenses and travel	\$ 9,731.20
(2) Loss of earnings	\$ 10,246.22
(3) Past domestic assistance	\$ 71,643.58

<b>TOTAL</b>	<b>\$301,671.50</b>
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[138] The special damages shall bear interest at the rate of 4 percent per annum from the date of the issue of the writ until today's date and thereafter at the rate of

6 percent per annum until payment.

[139] The general damages shall bear interest at the rate of 6 percent per annum from today's date until payment.

[140] Costs are awarded to the Claimant to be agreed or determined by the Court.

Sonia L. Richards  
Judge of the High Court